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JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 470

WALTHER DAIRY PRODUCTS,
THE BORDEN COMPANY,
WISCONSIN SWISS AND LIMBURGER CHEESE PRODUCERS' ASSOCIATION,
CHEESE PRODUCERS' MARKETING ASSOCIATION,
WILD COOPERATIVE CHEESE COMPANY, and
STATE OF WISCONSIN,
Petitioners,

vs.

KRAFT FOODS COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

WALTHER DAIRY PRODUCTS, THE BORDEN COMPANY, WISCONSIN SWISS AND LIMBURGER CHEESE PRODUCERS' ASSOCIATION, CHEESE PRODUCERS' MARKETING ASSOCIATION, WILD COOPERATIVE CHEESE COMPANY, and STATE OF WISCONSIN, *Petitioners,* *vs.* KRAFT FOODS COMPANY, *Respondent.*	No. .....

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners* pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on June 19, 1956.

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* The parties hereto will hereinafter be referred to, respectively, as follows: Walther Dairy Products as "Walther"; The Borden Company as "Borden"; Wisconsin Swiss and Limburger Cheese Producers' Association and Cheese Producers' Marketing Association as the "Associations"; Wild Cooperative Cheese Company as "Wild"; the State of Wisconsin as "the State"; and Kraft Foods Company as "Kraft".

CITATIONS TO OPINIONS BELOW

The opinion of the district court (IV, 2809,* *et seq.*) is reported at 118 F. Supp. 1. The opinion of the Court of Appeals (A, pp. 1a-10a**) is reported at 234 F. 2d 279. Petitions for rehearing were denied without opinion.

JURISDICTION

The judgment of the Court of Appeals was entered June 19, 1956 (A, p. 11a). Petitions for rehearing were denied on August 1, 1956 (A, pp. 11a-12a). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED

> **Question 1:** Can patent claims be lawfully held valid when they make no reference whatever to a step which is admittedly an essential part of the process asserted and found to be the invention?

The judgment below affirms the findings and conclusions of the trial court that all four claims of Kraft's Stine patent 2,494,636 are valid, and that the broader claims 2 and 3 were infringed.

The Stine patent relates to a process for curing Swiss cheese without rind. Each claim specifies using a body of uncured cheese as the starting material and applying to it three process steps, namely: (1) sealing the surfaces of

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* Throughout, Roman numerals followed by Arabic numerals refer, respectively, to the volume and page of the printed record on appeal.

** Throughout, the letter "A" followed by Arabic numerals refer to pages in the annexed appendix.

the uncured body; (2) enclosing the sealed cheese in a mold; and (3) curing the sealed enclosed cheese.

An additional step, namely, *drying the surfaces of the uncured cheese before sealing them,* is an essential part of the Stine process. The necessity for this drying step in practicing the Stine process is not disputed. Kraft admitted and asserted this drying step is an essential and novel part of the Stine invention, and the affirmed findings set it forth as such. The Stine claims do not directly or indirectly mention or include this essential drying step.

> **Question 2:** Should process claims be held infringed by a method, when the patentee, to obtain allowance of the claims by the Patent Office, has specifically defined the language of these claims to mean that such a method is excluded, and has represented to the Patent Office, by an accompanying affidavit, that such a method would not be operable?

In the Patent Office, Kraft, to overcome a rejection on a prior patent and obtain the allowance of the claims, specifically defined the sealing step of the claims to mean that the cheese is "completely covered with an unbroken film at all times" to prevent escape of gas. Kraft supported this definition with an affidavit that marketable Swiss cheese cannot be produced by the Stine process if the sealing permits gases to escape. The judgment below holds the claims were infringed by methods in which the sealing admittedly left passages for gas to escape and did not completely cover the cheese with an unbroken film.

STATUTE INVOLVED

> "The specification shall conclude with one or more claims particularly pointing out and distinctly

claiming the subject matter which the applicant regards as his invention" (35 U. S. C., § 112, second paragraph; 66 Stat. 798).

STATEMENT OF THE CASE

Kraft brought this action, pursuant to 28 U. S. C. § 1338 (a), in the Western District of Wisconsin, against Walther (a small cheese factory in that district, owned by the Walther family), for producing Swiss cheese by methods alleged to infringe Kraft's Stine patent 2,494,636, issued January 17, 1950. Borden, for whom Walther was then making the cheese, openly defended Walther and was added as a defendant. Wild (a small cheese factory, owned by a local dairy farmers' cooperative association) intervened as a defendant and the two cooperative Associations were added as defendants. The State also intervened as a defendant. A supplemental complaint charged each of the defendants with infringing the patent. Findings 1 to 10, IV, 2846-8. There is no dispute as to the jurisdiction of the trial court.

The patent (IV, 2953) relates to a process for curing Swiss cheese without rind. Swiss cheese was conventionally produced in the form of large wheels, weighing around 160 to 200 lbs., and to a lesser extent in the form of rectangular blocks, weighing around 20 to 30 lbs. In curing, a hard protective rind was developed on the outside of the cheese. The smaller block size suffered from having more outside surface and therefore more rind in proportion to its weight. The principal advantage of curing the cheese without rind is that it saves considerable cheese that is otherwise wasted in forming rind. Also, the retail trade now prefers to buy cured Swiss cheese in the form of rectangular packaged

blocks of "sandwich loaf" size, weight around 10 lbs. Rectangular blocks of Swiss cheese cured without rind, weighing around 80 lbs., such as Kraft produces by its rindless method, can be cut after curing into "sandwich loaves" of cured cheese and the cuts packaged for sale to the retail trade with less waste than when the same "sandwich loaves" are cut and packaged from the conventional rind cured wheel or block Swiss cheese.

More Swiss cheese is made in this country than any other kind except for American (sometimes called Cheddar) cheese. During 1952*, Kraft produced over 43,000,000 lbs. of the 104,000,000 lbs. of Swiss cheese produced by the entire American industry (D. C. Opinion, IV, 2838).

Kraft is the only large company which produces any significant percentage of the Swiss cheese produced in the United States. Substantially all the remainder is produced in small factories owned by cheese making families (such as Walther), local cooperative groups of dairy farmers (such as Wild), or other types of dairymen's associations.

The cheese made in the small local factories is purchased and distributed by cooperative associations (such as the Associations) or by a few cheese distributing companies (such as Borden). The cheese distributing companies only make experimental quantities of Swiss cheese. Borden, for example, makes less than 1% of the Swiss cheese it distributes (II, 949, 950).

Over a billion pounds of cow's milk are used annually to make Swiss cheese and most of the dairy farmers supplying this milk are dependent on the small local factories for their market. Petitioner the State is vitally concerned

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* 1952 was the last year for which production figures were available at the time of the trial.

in this case because most of these small local factories and the dairy farmers supplying them are located in Wisconsin. Except for the production controlled by Kraft, which already dominates the business, Swiss cheese production is largely concentrated in the Seventh Judicial Circuit. Kraft has refused to license competitors (II, 955-6).

The conventional Swiss cheese process and the improvement on it claimed in the Stine patent:

A sequence of nine steps used in making "cheese of the Swiss type" by the old conventional wheel process is listed in column 1 of the Stine patent (Finding 26, IV, 2851-2). These include inoculating milk with certain bacteria, coagulating the milk to form a curd, cutting the curd, stirring and heating the curd and whey, separating the whey, pressing the curd into a body, salting the body by soaking it in cold salt brine, draining off the brine and storing the body in a cold room for several days, and putting the body in a warm room to cure for several weeks. During the curing, gas forms in the cheese and produces the holes called "eyes" that are characteristic of Swiss cheese. The eye formation expands the volume of the cheese by about 17%.

The Stine patent defines cheese of the Swiss type as cheese in the manufacture of which the above listed nine steps of the conventional wheel process are used. It claims a curing process which the description says produces cheese of the Swiss type without rind or surface defects. Each of its four* claims specifies starting with "an uncured body"

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* Only claims 2 and 3 were found to be infringed. Claim 1 is limited to details of the mold enclosing step, and claim 4, to milk fat details, not used in the methods adjudged to infringe. The claims are quoted in the Court of Appeals' opinion (A, pp. 1a-3a).

of "cheese of the Swiss type", and applying three steps to such uncured body: namely, (1) sealing the exterior surfaces of the uncured body; (2) enclosing the sealed body in a mold of suitable capacity; and (3) curing the enclosed sealed body in the usual warm room for the conventional temperature and time (D. C. Opinion, IV, 2834) to develop eyes.

Successful methods were previously patented and in commercial use for curing American (Cheddar) cheese without rind or surface defects. These American cheese methods included (1) sealing by applying to the surfaces of the uncured American cheese a flexible fluid-proof wrapping sheet, (2) enclosing* by boxing the wrapped sealed cheese to keep it from slumping out of shape in curing, and (3) curing the boxed sealed cheese (D. C. Opinion, IV, 2817-8; Jones patent, IV, 3003; Abrams patent, IV, 2981; Kraft method, IV, 2455-8, 2725-6; Pliofilm methods, IV, 2556-65). However, to cure Swiss cheese without rind by the Stine invention, another step—not directly or indirectly mentioned or included in the Stine claims, and not used either in the conventional Swiss cheese process or in these prior American cheese wrap sealing and boxing methods—is admittedly essential.

The admittedly essential and distinctive but unclaimed drying step of the Stine process:

At the trial, and in its briefs and arguments throughout the litigation, Kraft admitted and asserted that, *before the sealing step* pointed out in the claims, another step—*drying the surfaces of the uncured cheese until really dry*

* Putting the sealed cheese in an ordinary rigid wooden box, open at the top, was held to satisfy the enclosing step of Stine's claims 2 and 3 (Findings 90(f)(g), 91, IV, 2871-2; Stine, I, 177).

—is essential for practicing the Stine process. Kraft's evidence proved that, if uncured Swiss cheese at the time of sealing does not have surfaces that are dried until they are really dry (as distinguished from "drained" or only partially dried), the resulting cured cheese has a rotten malodorous surface and is neither marketable nor fit for human consumption (Stine, I, 201, 246, 331; Rausch, III, 2048-50, 2053-5). The evidence aptly refers to such cheese as "stinkers".

The trial court's opinion and affirmed findings defining the Stine invention include this admittedly essential drying step as part of the Stine invention (See, for example, Findings 55-56, IV, 2861; Finding 97, IV, 2874; D. C. Opinion, IV, 2816, 2835). Both lower courts' opinions and findings assume this essential drying step is part of the invention, but fail to point out how it can lawfully be found or implied into the text of the claims.

Kraft relied upon this essential drying step in distinguishing the Stine process from the prior commercial methods of curing American cheese without rind, in which the uncured American cheese was sealed with a wrapper without first drying the surfaces. The affirmed findings also refer to the essential drying step as part of Stine's process in distinguishing such prior methods (Finding 97, IV, 2874).

The reference in the claims to an "uncured body" of "cheese of the Swiss type" as the starting material, does not require or imply that its surfaces be dry before sealing. The patent definition of cheese of the Swiss type contains no statements that the surfaces of uncured cheese must be dried until dry as distinguished from merely "draining" off the brine and leaving the surfaces moist. Furthermore,

that definition sets forth a sequence of nine steps used in the old conventional wheel process as well as in the Stine process (Finding 26, IV, 2851-2); and, in the conventional process, the surface of the uncured cheese was not dried before curing, but only drained after brining and thereafter kept moist by frequent washings with brine (Stine, I, 201; Kraft's Ex. 6, IV, 2289; Finding 27, IV, 2852). So far as the definition of cheese of the Swiss type is concerned, Stine's claimed process seeks to monopolize sealing the surfaces of uncured Swiss cheese at any time after brining and draining and before curing it in the warm room, whether or not the surfaces are dry.

This Court and other Courts of Appeal have held, in the decisions referred to *infra*, pp. 16-18, that a step essential to the invention cannot be read into the claims which do not include it, even if such step is disclosed in other parts of the patent description.

The opinions and findings of the courts below assume (contrary to the claim requirements of the Patent Statutes as set forth in this Court's decisions) that the essential drying step can be read into the claims from other parts of the patent specifications. But on the face of the Stine patent the necessity for the drying step is not disclosed, and no basis is afforded for reading the drying step into the claims from the patent description even if that could lawfully be done.

The only mention of drying anywhere in the patent occurs in connection with a sealing example in which a wax coating was applied to the surfaces by dipping uncured cheese momentarily in molten wax (pat., col. 5, IV, 2955). This wax dipping procedure was admittedly a standard operation throughout the whole cheese industry for sealing

the surfaces of cheese (Stine, I, 116), and it was well known in the trade that, for sealing any kind of cheese by wax dip sealing, the surfaces must be dry because molten wax will not adhere to moist surfaces (Stine, I, 229; Sommer, II, 1121-2; Ingle, II, 1331).

The Stine patent also refers (pat., col. 5, IV, 2955) to an alternative method of sealing, to wit, applying an elastic flexible fluid-proof cheese wrapping sheet to seal the surfaces, and does not mention any necessity for drying the surfaces before sealing them in this way. Wrap sealing methods were also widely used and published for sealing uncured American cheese to cure it without rind (D. C. Opinion, 2816-8). The trade knew that it was not necessary or usual to dry before wrap sealing. The patent description contains no teaching that uncured Swiss cheese is unusual in this respect or that there is any necessity or purpose for drying the surfaces of uncured Swiss cheese before sealing them, when wrap sealing is used.

Mere mention of drying in connection with wax dip sealing—well known to be a necessary incident thereof—is not a teaching that drying is also essential before sealing by other means. So, even if the specifications could lawfully be resorted to to imply into the claims the omitted essential step, the patent description does not contain any proper basis for doing so. The claims purport, and were construed by the decisions below, to cover wrap sealing methods as well as wax sealing methods. By omitting the essential drying step of the Stine process, the claims are broader than the operable scope of Stine's invention.

Although not essential to a decision of this question of law, unchallenged contemporaneous documents of Kraft and its consultants (ignored in the findings) *show plainly*

that the necessity of drying until dry before sealing uncured Swiss cheese in a wrapper was not discovered by Kraft or Stine until many months after the Stine patent application was filed (Ex. 146, IV, 2532; Ex. 46-B, IV, 2329-30; Ex. 315, IV, 2804; Ex. 44, IV, 2324).

The invalidity of the claims for failure to point out the essential drying step was urged by petitioners in their briefs and arguments in both courts and specifically raised again in the appellate court by petitions for rehearing.

The trial court found that the "specification of the application for the patent" and the Stine "patent itself" contained "all information necessary to enable a Swiss cheese maker of ordinary skill to make natural rindless block Swiss cheese" (Finding 62, IV, 2862), and sustained the validity of all four claims. The trial court's opinion and findings do not explain how the essential drying step can be lawfully found in the claims. The Court of Appeals' opinion (A, p. 4a) refers to petitioners' unanimity of approach in urging that the claims are void because they are "too broad, indefinite, functional and excessive"; but gives no explanation as to how the essential drying step can be lawfully found in the claims.

The limited meaning imposed on the sealing step of the Stine claims in the Patent Office but ignored in finding infringement:

The first step of the Stine process is claimed as "sealing the exterior surface" (claim 2) and "applying a coat of flexible, fluid-proof, sealing material to the exterior surface" (claim 3). The entire description of the sealing step in the patent is in three paragraphs (col. 5, ll. 29-47, IV, 2955), which mention as alternate procedures either dipping

in molten amorphous wax or applying "a wrap of elastic-flexible material".

In the last Patent Office action before allowance of the Stine patent, the claims were rejected (IV, 2407) on a Jones patent (IV, 3003), showing the application of Pliofilm, an elastic flexible fluid-proof cheese wrapping sheet, to the surfaces of uncured American cheese, putting the wrapped cheese in a box, and then curing the boxed sealed cheese. The rejection stated:

> "Jones carries out what are deemed to be the identical method steps of applicant's [Stine's] claims. Jones does not specifically mention Swiss cheese curd. It is not deemed to involve invention to try the method of Jones on various cheese curds made by various conventional methods and find, as taught with cheeses in general, that it will work".

To overcome this rejection, Kraft, in Amendment C, represented that, in the case of Swiss cheese, the sealing must prevent escape of gases. Claims 2 and 3, found to be infringed, were introduced by Amendment C. This amendment did not change materially the wording of previously rejected claims, but defined the sealing step of the Stine claims to mean as follows (IV, 2414-5):

> "The term 'sealing' in the claims, as *defined* by the description, *means* that the exterior surface of the cheese is *completely covered with an unbroken film at all times.*"

With this amendment, Kraft filed a Peugh affidavit, which stated under oath (IV, 2424):

> "8. In view of my experience . . ., I can state that the Jones process *would not be operable to pro-*

> *duce a marketable Swiss cheese.* This inoperability stems from the fact that according to the Jones patent breathing openings are provided in the wrapper at either or both ends of the cheese so as to allow gases to escape from the package. If Swiss curd was wrapped in this manner, the gases would escape and the cheese would be blind and of poor quality or the surfaces of the cheese would be deeply cracked or split."

Upon these representations as to the meaning of the sealing step in the Stine claims and that sealing methods which permitted escape of gas would not work in the Stine process, the claims were then allowed.

Kraft, apparently recognizing that the representations limited the meaning of sealing at least to some extent, admitted in open court that the Pliofilm wrapping methods which wrapped the cheese in only one sheet of Pliofilm, without sealing up the overlaps and folds, were not sealing within the meaning of the claims, and did not infringe. These admissions are set forth in Supplemental Finding A (IV, 2887-8).

However, petitioners' methods which wrapped the cheese in the same way with two sheets of Pliofilm, one over the other, were asserted and found to infringe in Supplemental Finding B (IV, 2888) and Findings 92-95 (IV, 2873). These findings were made in spite of Kraft's admission (III, 2282) that such methods provided "a tortuous passageway to *retard* the passage of gases into or out of the wrapper". Thus, they too were clearly outside the meaning of the Stine claims, as represented to the Patent Office.

In dealing with validity, the trial court found that Stine's sealing step differed from the American cheese

sealing, saying that in "the Stine process" (Finding 97, IV, 2874):

> "The surface of the curd is then sealed for the purpose of *inhibiting* the passage of gases and moisture, and with no intention to permit any gas to escape."

Also, the trial court's opinion (IV, 2817) points out that overwrapping with a second fluid-proof sheet to improve the sealing, while intentionally leaving some slight vent for gas to escape from the curing cheese without bloating the wrapper, was old in the American cheese practice.

Yet, in dealing with infringement, methods which improved the sealing effect by overwrapping with a second sheet, while still intentionally leaving vents for gas to escape, were found to infringe, apparently on Kraft's contention that they were equivalents of the Stine method.

The Court of Appeals' opinion quoted from a prior Amendment B (which was followed by the above mentioned rejection on the Jones patent), but did not discuss the limiting effect of Amendment C or the question of infringement.

Petitions for Rehearing:

On July 3 and 5, 1956, petitioners filed petitions for rehearing before the Court of Appeals, pointing out the court's failure to consider these basic arguments with regard to invalidity and non-infringement (Certified Record). These petitions for rehearing were denied without opinion (A, pp. 11a-12a).

REASONS FOR GRANTING THE WRIT

This case involves questions of fundamental importance to the economic security of a substantial segment of the dairy industry which are not likely to be litigated in any other Circuit:

The patent in suit has another ten years to run. Kraft has stated its intention to enforce the patent against competing Swiss cheese manufacturers and that it will refuse to grant them licenses under the patent (II, 955-6).

The broad construction placed upon the claims in determining infringement discourages and stifles efforts to find non-infringing procedures by which a competitive product may be obtained. The State of Wisconsin, through its Wisconsin University and Department of Agriculture laboratories, has conducted and wants to continue research to develop improved and non-infringing methods for the benefit of its Swiss cheese industry. The State is hampered in such work by the broad and indefinite scope of the Stine claims, as sustained by the decisions below. While the judgment below holds that the State, in doing such work, is performing a Government function and therefore is not itself liable for infringement, the State should not incur expense for research work from which, for the next ten years, only Kraft may be able to benefit, depending on how the nebulously broad Stine claims may or may not be construed if the local cheesemakers use methods developed by the State for their benefit.

Kraft, even prior to the patent, dominated this industry. In 1952, only two years after the issuance of the patent and before any determination of its validity, Kraft made over 40% of all Swiss type cheese produced in this

country (*supra*, p. 5). With Kraft possessing the economic advantage of the patent as broadly construed by the lower courts, the small Swiss cheese factories and the many dairy farmers dependent on them will be at an even greater disadvantage in attempting to compete with Kraft.

By far the greatest part of the Swiss cheese manufacturing in this country by others than Kraft takes place within the Seventh Judicial Circuit. Few large companies are concerned with Swiss cheese production. The State and the other petitioners are the parties most able to oppose the respondent.

In *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U. S. 47, 50 (1938) and in *Exhibit Supply Co.* v. *Ace Patents Corp.*, 315 U. S. 126, 128 (1942), this Court ruled that, where it is improbable that a conflict of decision respecting the validity of a patent will arise in different circuits, because the industry to which the patent pertains is concentrated in one circuit, there is reason to grant certiorari to review a decision in that circuit sustaining the validity of the patent. That reason is present in this action.

The decision of the Court of Appeals, sustaining patent claims which omit an essential element of the claimed invention, is in conflict with decisions of this Court and of other Courts of Appeals:

A patent claim is invalid if it fails to *claim* a step which is essential to practicing the invention (*Altoona Theatres* v. *Tri-Ergon Corp.*, 294 U. S. 477, 487 [1935]; *Graver Mfg. Co.* v. *Linde Co.*, 336 U. S. 271, 276-7 [1949]).

The claims of the Stine patent do not recite or otherwise include the drying step which is essential to practicing the claimed process (See Statement, *supra*, pp. 6-11).

The opinions below sustained these claims but do not explain how the admittedly essential drying step of the invention can be lawfully found in the claims.

In *Altoona Theatres* v. *Tri-Ergon Corp.*, 294 U. S. 477, 487 (1935), this Court ruled:

> "Under the statute it is the claims of the patent which define the invention. . . . As none of the fly-wheel claims as drawn define an invention, none can be aided by reading into it parts of the specifications, or of other claims, which the patentees failed to include in it."

In *Graver Mfg. Co.* v. *Linde Co.*, 336 U. S. 271 (1949), this Court rejected the contention that claims too broad to be valid might be saved by resorting to the specifications to supply or correct the defect.

In the *Graver* case, the patentee had broadly claimed, in connection with the invention of an electric flux, the use of "silicates" or "metallic silicates". Nine metallic silicates which had been proved operative were listed in the specifications. The trial court considered the claims too broad since they literally covered inoperative materials and comprehended more than the invention. The Court of Appeals reversed, holding that the trial court should have construed these claims as limited by the specifications to the nine metallic silicates listed therein. This Court, reinstating the judgment of the trial court, stated (p. 277):

> "The statute makes provision for specification separately from the claims and requires that the latter 'shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery.' R. S. § 4888, as amended, 35 U. S. C. § 33. It would accomplish

> little to require that claims be separately written if they are not to be separately read. While vain repetition is no more to be encouraged in patents than in other documents, and claims like other statements may incorporate other matter by reference, their text must be sufficient to 'particularly point out and distinctly claim' an identifiable invention or discovery. We have frequently held that it is the claim which measures the grant to the patentee. . . . While the cases more often have dealt with efforts to resort to specifications to expand claims, it is clear that the latter fail equally to perform their function as a measure of the grant when they overclaim the invention. When they do so to the point of invalidity and are free from ambiguity which might justify resort to the specifications, we agree with the District Court that they are not to be saved because the latter are less inclusive. . . . "

The 1952 Patent Act requires the same separation of specifications and claims, and the same requirement for including all essential steps of the invention in the claims (35 U. S. C. § 112).

The judgment below is also in conflict with decisions of the First and Ninth Circuits in *H. Schindler & Co., Inc.* v. *C. Saladino & Sons,* 81 F. 2d 649 (C. A. 1, 1936), and *Winslow Engineering Co.* v. *Smith,* 223 F. 2d 438, 443-4 (C. A. 9, 1955), affirmed on rehearing, 228 F. 2d 332. Cf. *Cutter Laboratories, Inc.* v. *Lyophile-Cryochem Corp.,* 179 F. 2d 80, 86 (C. A. 9, 1949).

Furthermore, the patent description does not disclose that drying is essential to the process (See Statement, *supra,* pp. 8-10). It was not even sufficient to inform the inventor, himself, that drying was necessary to the practice

of his invention (See Statement, *supra*, pp. 10-11). This patent should be considered invalid for failure to disclose a step which the inventor asserts is essential to practicing the invention (*Stelos Co.* v. *Hosiery Corp.*, 295 U. S. 237, 241-2 [1935]; *Permutit Co.* v. *Graver Corp.*, 284 U. S. 52, 60 [1931]).

The omission of the drying step from the patent claims resulted in broad claims to a process which Kraft admitted and asserted is not broadly operable to produce marketable or edible Swiss cheese. The claims thus sustained discourage subsequent inventors from developing a process which might be employed without drying the surfaces before sealing. By virtue of the decisions below, Kraft is permitted to monopolize more than Stine invented.

The decision below, upholding findings of infringement by methods of a kind specifically excluded by the patentee before the Patent Office, is in conflict with decisions of other Courts of Appeals and involves an important question of public law that should be settled:

In *Exhibit Supply Co.* v. *Ace Patents Corp.*, 315 U. S. 126, 136 (1942), and *I. T. S. Rubber Co.* v. *Essex Rubber Co.*, 272 U. S. 429 (1926), this Court held that the doctrine of equivalents cannot be used to find infringement by things of a kind which a restrictive amendment excluded from the scope of the claims. In the *I. T. S. Rubber Co.* case, the Court (pp. 436-9) refers to the statements made in presenting the restrictive amendments to determine the meaning of the amendments made.

However, this Court has not specifically ruled on the effect which should be given to representations made to the

Patent Office to overcome a rejection, when, instead of changing pertinent words of a previously rejected claim, statements and affidavits are filed as to what those words as defined by the patent description include and exclude.

In the present case, the claims found to be infringed (claims 2 and 3 of the patent) were presented as new claims by Amendment C. However, the wording did not materially change the language used in certain rejected claims which were canceled by this amendment. Instead (See Statement, pp. 12, 13, *supra*), statements and an affidavit presented with the amendment represented to the Patent Office that the words used in the claims as defined by the description requiring sealing the surfaces of the uncured Swiss type cheese with a completely unbroken film at all times, and, by affidavit, that the prior art type of sealing which left passages for gas to escape from the cheese, would not be operative if used in Stine's claimed process.

The law on the question of what effect should be given to such statements or affidavits when the wording of previous claims is not materially changed, is in conflict in the various circuits.

In the Third, Fifth, Sixth, and Tenth Circuits, such statements are regarded as evidencing the limits of the claimed invention for the purposes of determining infringement. See, for example, *Lanova Corp.* v. *National Supply Co.*, 116 F. 2d 235, 238 (C. A. 3, 1941); *Allen-Bradley Co.* v. *Erie Resistor Corp.*, 104 F. 2d 150, 151-2 (C. A. 3, 1939); *Godfrey L. Cabot, Inc.* v. *J. M. Huber Corp.*, 127 F. 2d 805, 807-8 (C. A. 5, 1942); *Thabet Mfg. Co.* v. *Kool Vent Metal Awning Corp.*, 226 F. 2d 207, 210 (C. A. 6, 1955); *Wiegand* v. *Bingham Co.*, 106 F. 2d 546, 548 (C. A. 6, 1939); *Texas*

Co. v. *Anderson-Prichard Refining Corp.*, 122 F. 2d 829, 840-1 (C. A. 10, 1941).

On the contrary, in the Second and Fourth Circuits, the file history of a patent may only be used to limit the scope of the claims by comparing the language of the patent claims with that of claims canceled or amended. Statements or affidavits in the file history as to what the patentee considered to be within or without the scope of claims are disregarded. See, for example, *A. G. Spalding & Bros.* v. *John Wanamaker*, 256 F. 530, 533-4 (C. A. 2, 1919); *Katz* v. *Horni Signal Mfg. Corp.*, 145 F. 2d 961, 963 (C. A. 2, 1944); *Denominational Envelope Co.* v. *Duplex Envelope Co.*, 80 F. 2d 186, 192-3 (C. A. 4, 1935).

In *Van Der Horst Corp.* v. *Chromium Corp.*, 98 F. Supp. 412, 416 (S. D. N. Y., 1951), the court pointed out that, under the rule prevailing for example in the Sixth and Tenth Circuits, infringement would not be found because of an affidavit in the file history but that, under the rule in the Second Circuit, this affidavit could not be considered and therefore infringement was found "despite the patentee's own assertions in the application proceedings that defendant's product bore no similarity to the patentee's product".

In the present case, the Seventh Circuit has followed the Second Circuit rule and, in finding infringement by certain accused methods, has disregarded Kraft's restricting statements and affidavits made in Amendment C (See Statement, pp. 12-13).

The question of law as to whether or not such statements and affidavits can be used to limit the scope of the claims is of great public importance and should be settled by this Court. The public, and the bar in advising the

public as to whether or not a proposed process may infringe a patent, consult the file history of the patent (which in the case of an issued patent is available to the public on request) to ascertain as accurately as possible the scope of the patent claims. Whenever, as is frequently the case, the file history contains statements or affidavits, disavowing some meaning of an unchanged claim, the unsatisfactory answer has to be that the outcome of infringement litigation probably depends on the circuit in which the litigation may be brought.

The conflict between circuits on this question is apt to result in races between patent owners and declaratory judgment defendants to start the litigation in a circuit favoring their side of this unsettled question and thus burden trial courts with problems of jurisdiction and venue.

The question is one which should be settled by this Court and the present case presents a clear cut statement of undisputed facts on which it may be considered.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this petition for a writ of certiorari be granted.

Respectfully submitted,

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September, 1956.

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

FILED JUNE 19, 1956

Before FINNEGAN, SWAIM and SCHNACKENBERG, *Circuit Judges.*

FINNEGAN, *Circuit Judge.* Three appeals[1] were taken from a single judgment entered February 26, 1954, in this patent infringement action involving U. S. Letters Patent No. 2,494,636 issued January 17, 1950 to plaintiff, Kraft Foods Company as assignee of the inventor James Bryan Stine. We use the references "Stine" or "636," as designating the method patent in issue containing this introductory paragraph:

> "The Emmenthaler type of cheese or process originated in Switzerland, and the cheese of that type made in the United States is, for that reason, generally called 'Swiss' cheese. For the purpose of this case, a cheese of the Swiss type is considered to be a cheese made by the Emmenthaler or Swiss process . . ."[2]

The Stine patent was held valid by the trial judge as to each of its following four claims:

> "1. The improvement in the art of making a body of natural cheese of the Swiss type which comprises

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1. Walther Dairy Products and The Borden Company appealed in Number 11199. Wild Cooperative Cheese Company intervened as a defendant in Number 11200 and joined in the brief of Wisconsin Swiss And Limburger Cheese Producers' Association, and Cheese Producers' Marketing Association. The State of Wisconsin filed a separate brief and appeal in Number 11201.

2. The word "case," of course, is employed in Stine's patent. Column 1. T. R. 2953.

applying a coat of extensible, flexible, fluid-proof sealing material to the exterior surface of the uncured body to seal the surface of said body prior to eye development in a warm room and curing the sealed body in the warm room while confining the body under controlled pressure within an expandable mold, said mold expanding during the curing operation under the internal pressure generated within said body by the curing process.

"2. The improvement in the art of making a body of natural cheese of the Swiss type, which comprises sealing the exterior surface of the uncured body prior to eye development in a warm room, enclosing the sealed body in a mold of such capacity that the body volume increase caused by the development of eyes within the body will cause the body to snugly fill said mold, and placing the enclosed, sealed body in the warm room to effect the development of eyes.

"3. The improvement in the art of making a body of natural cheese of the Swiss type, which comprises applying a coat of flexible, fluid-proof, sealing material to the exterior surface of the uncured body prior to eye development in a warm room, enclosing the sealed body in a mold of such capacity that the body volume increase caused by the development of eyes will cause the body to snugly fill said mold, and placing the enclosed, sealed body in the warm room to effect the development of eyes.

"4. The improvement in the art of making a body of natural cheese of the Swiss type from cow's milk containing about 3.5% of fat, which comprises sealing the exterior surface of the uncured body prior to eye development in a warm room, enclosing the sealed body in a mold of such capacity that the body volume

increase caused by the development of eyes within the body will cause the body to snugly fill said mold, and placing the enclosed, sealed body in the warm room to effect the development of eyes."

From the conclusions of law, filed below, it is clear that the critical claims are numbers three and four; that they are the focal points of the welter of briefs, documents, exhibits, and 3000 page record brought here by the parties.

Under our earlier decision in *Hazeltine Research* v. *Admiral Corp.*, 183 F. 2d 953, 955 (7th Cir. 1950), we would reverse this judgment adverse to these defendants-appellants only for "clearly erroneous" findings. For what we there quoted from *Graver* v. *Linde*, 336 U. S. 271 (1949), is controlling here. No sound legalistic basis has been found, after an extensive study of the record before us, warranting deviation from the *Hazeltine* explanation and application of Rule 52(a), Federal Rules of Civil Procedure, 28 U. S. C. A. We will leave the judgment appealed undisturbed.

This expansive record, embracing myriad facts relevant to our considerations, successfully eludes all hopes of facile and useful distillation. However some relevant aspects of the case are shown by the trial judge's memorandum opinion reported as *Kraft Foods Co.* v. *Walther Dairy Products*, 118 Fed. Supp. 1 (D. C. Wisc. 1954). The findings of fact and conclusions of law, which we have subjected to detailed study, cover pages 2846 to 2881 in the printed record. We are reluctant to extend this opinion with such a lengthy reprint, indeed we can, and do, ap-

prove them without repeating all of that part of the district judge's work-load.

What first appeared as a clearly delineated trisected attack on those findings and conclusions, deteriorated when defendants' briefs were studied. For there is a marked overlapping and duplication of contentions spread out among the three groups of defendants. Accordingly we can dispose of propositions common to, and relied upon, by them rather than treat each appeal separately.

Because Stine's patent comes to issue clothed in a presumption of validity, defendants launch a multiple-pronged attack pointed at: (i) invalidating that patent, (ii) overcoming "636", and (iii) challenging the quantum of evidence required for rebutting the presumption. Various facets of such points are embedded among the clusters of issues and propositions of law relied on by each group of defendants. Thus, attempting to strike down Stine's patent, defendants display an unanimity of approach urging Stine's claims are void because they are too broad, indefinite, functional and excessive.

There is a marked affinity between this Court's observation in *Colgate-Palmolive-Peet Co.* v. *Lever Bros. Co.*, 90 F. 2d 178, 191 (7th Cir. 1937) and the situation now before us, viz: ". . . (I)t is particularly urged that the process claims are lacking in specificity. In answer thereto it may be said that appellee had no difficulty in understanding or following the teachings of . . . [the patent]" For an illustration of that statement it is only necessary to study this record and examine findings of fact numbered 75, 76, 77, and 82. *United States* v. *Gypsum Co.*,

333 U. S. 364, 395 (1948) provides a discussion of the benchmarks employed for assaying findings made at the trial level. Relevant here is this one:

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[3]

Though this record consists of parol and documentary evidence, we accept the findings of fact made below because we are convinced there is absent an error warranting reversal flowing from what would have to be our independent, *de novo,* findings of fact.

Defendants challenge what some of them describe as the trial judge's requirement "that the presumption . . . be overcome by proof beyond a reasonable doubt." This tenuous assertion of error has its genesis in the following paragraph of the memorandum opinion:

> "The burden rests on the defendants in this action to prove beyond a reasonable doubt that the patent in suit has been anticipated by prior art or prior invention, and that the prior art use, claimed as a defense herein, was at the time adopted or followed, to an extent sufficient to create a well understood, if not established practice, capable at anytime of being resorted to, and not something incidental, indefinite and fugitive, which is hunted up and brought forward simply for the purpose of defeating the patent. The defense has wholly failed to meet this burden of proof. *Cantrell* v. *Wallick*, 117 U. S. 689, 695". (T. R. 2830).

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3. Footnotes of the Court have been omitted.

These defendants attempt to cut ground from under the judgment appealed by utilizing a variety of phrases lurking in sundry patent decisions. Their argument culminates with the citation of *Radio Corporation of America* v. *Radio Engineering Laboratories,* 293 U. S. 1. (1934) from which they extirpate several lines congenial to their position. Indeed they stamp "The holding of the *Radio Engineering Lab Case*" as "sound and sensible." What Mr. Justice Cardozo said in the full passage, relevant here, merits repeating (293 U. S. 1, 7-8):

> "A patent regularly issued, and even more obviously a patent issued after a hearing of all the rival claimants, is presumed to be valid until the presumption has been overcome by convincing evidence of error. The force of that presumption has found varying expression in this and other courts. Sometimes it is said that in a suit for infringement, when the defense is a prior invention, 'the burden of proof to make good this defense' is 'upon the party setting it up,' and 'every reasonable doubt should be resolved against him. . . .' (citing *Cantrell* v. *Wallick,* 117 U. S. 689, 695, 696 among other cases). Again it is said that 'the presumption of the validity of the patent is such that the defense of invention by another must be established by the clearest proof—perhaps beyond reasonable doubt'. . . . The context suggests that in these and like phrases *the courts are not defining* a *standard in terms of scientific accuracy* or *literal precision,* but were offering counsel and (*sic*) suggestion to guide the course of judgment. *Through all the verbal variances, however, there runs this common core of thought and truth, that one otherwise an infringer who assails the validity of a patent fair*

upon its face bears a heavy burden of persuasion, and fails unless his evidence has more than a dubious preponderance." (Italics added).

What these defendants are challenging is an articulation of thoughts suggested by the trial judge regarding their failure to overcome Stine's patent. Somewhat similar language is found in *Merrill* v. *Builders Iron Co.*, 197 F. 2d 16, 19 (10th Cir. 1952). Without a jury as the fact finders, the technical niceties sometimes demanded for instructions are insufficient reasons for annulling a trial judge's ultimate decision. We are unpersuaded that the evidence traced in this record hung in such delicate balance that the concept of proof mentioned by the district judge, even if subjectively held, overwhelmed his evaluation of the facts disclosed by the evidence. He made a personal plant inspection of all the various operations or steps involved in the manufacture of natural rindless block Swiss cheese. (Findings of fact 12, 13, and 14). Such intimate observations of the processes involved are closely analogous to the situation reported in *Graver Manufacturing Co.* v. *Linde Co.*, 336 U. S. 271, 274-275 (1949). Much of the argument put forward by defendants has long since been dissipated by Judge Major's opinion already referred to, and reported as *Hazeltine Research* v. *Admiral Corporation*, 183 F. 2d 953, 955 (7th Cir. 1950). Indeed a line, authored by Judge Major, has particular significance in the case before us: ". . . we think it apparent that there has been a tendency to place the review of patent cases in a category different from other cases." 183 F. 2d 953, 955. Aside from a prolix

record there is nothing esoteric about this patent case, unless it be the semantic jugglery displayed in the briefs, *e. g.* stale polemics about the rindless rind.

With findings of fact firmly embedded in the evidence, we turn to another major point suggested by defendants as the basis for annulling the judgment appealed. The critical claims are communications of Stine's intellectual conceptions of the "sealing step" developed by him after research and experiment; also described in his testimony from the witness stand. Words, the outer wrappings used to bundle ideas for delivery to auditors and readers, are often tools for tortured logic. Such an instance rears up here. If these claims are read and studied from an unbiased viewpoint it is apparent the "636" patent suffers none of the deficiences defendants envisage. Most patents, like all communications, are open to as many interpretations as the ingenuity of counsel can conjure up. Practicality of meaning, however, steps in and arrests such runaway arguments. See *e. g. Gear* v. *Fairmont Electric Mfg. Co.*, 231 Fed. 728, 731 (3rd Cir. 1916). Stine invented a process and claimed an improvement in the art of making a body of natural cheese of the Swiss type. It is abundantly clear that his patent was not limited to a particular sealing material or any one step in procedure. One demonstration of that proposition, sufficient here, appears in a passage from Amendment B, in Stine's response to the Patent Office action of April 8, 1948 (T. R. 2397, 2399):

> "As was pointed out in the interview, it is necessary to seal the exterior surface of the cheese in a

layer of elastic-flexible or extensible fluid-proof material before the body of curd is cured in the hot room. This sealing may be effected either by dipping the cheese in a molten bath of wax, paraffin, or the like, or the sealing may be accomplished by wrapping the block of curd in a sheet of extensible flexible material such as, for example, cellophane. It is also stated that the cellophane may carry a coating of wax or other similar material. It is, of course, obvious to one skilled in the art that various other equivalent sealing materials known to the art may be used. Applicant is not trying to specifically claim any one or any group of sealing compounds but is claiming the step of sealing the exterior surface of a body of Swiss curd prior to curing in a hot room. Thus the application is not directed to packaging cheese but to a method of curing or producing an improved natural cheese of the Swiss-type."

(Underscoring appears in the transcript of record.)[4]

When the Patent Office Board of Interference Examiners issued their opinion in *Honer*[5] v. *Stine*, 95 U. S. P. Q. 373, 387 (1952) they stated, *inter alia:*

"Since Honer did not have a complete conception of the invention in issue he could not have communicated it to his opponent. . . .

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4. See *e. g.* Lines 40 to 48, Column 5 of the Stine patent and his testimony on redirect. T. R. 417-418.

5. Clemence J. Honer, an employee of the State of Wisconsin, a party in this appeal, who filed an application for a patent and assigned his rights to the State of Wisconsin. Hence the State's contention before us that as *parens patriae*, it resists assertion of an allegedly invalid monopoly by Kraft.

> "Honer has failed to establish actual reduction to practice as alleged. Honer has failed to prove the charge of derivation.
>
> "Priority of invention of the subject matter in issue is hereby awarded to James Bryan Stine the senior party."

That recitation, because it neatly epitomizes a telling facet of the present appeal is quoted here, but only for that reason. The interference proceedings have not influenced our decision. We regard the district court's findings sustained by substantial evidence. Indeed the record demonstrates Stine added to the sum of useful knowledge. The question of validity of a patent, a question of law, was correctly decided by the trial judge.

It seems plain to us, without detailing and reporting each piece of vital evidence, this record demonstrates that some new teachings were patented first by Stine. His *process* is what enjoys protection against infringement. We refuse to invalidate his patent by upsetting the judgment under review. After mature deliberations we found so little substance in the variety of points sponsored by the defendants that any detailed or further discussion here is needless. Our canvass of this record, measured by all the contentions defendants urge, has well satisfied us of the absence of any reversible or prejudicial errors. Accordingly the entire judgment is affirmed.

AFFIRMED.

JUDGMENT*
ENTERED JUNE 19, 1956

Before

HON. PHILIP J. FINNEGAN, *Circuit Judge*
HON. H. NATHAN SWAIM, *Circuit Judge*
HON. ELMER J. SCHNACKENBERG, *Circuit Judge*

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Wisconsin, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs.

ORDERS DENYING PETITIONS FOR REHEARING
ENTERED AUGUST 1, 1956

Appeal No. 11199, by Walther Dairy Products and The Borden Company:

Before

HON. PHILIP J. FINNEGAN, *Circuit Judge*
HON. H. NATHAN SWAIM, *Circuit Judge*
HON. ELMER J. SCHNACKENBERG, *Circuit Judge*

It is ordered by the court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

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* The judgments in all three appeals are identical.

Appeal No. 11200, by Wisconsin Swiss and Limburger Cheese Producers' Association, Cheese Producers' Marketing Association, and Wild Cooperative Cheese Company

and

Appeal No. 11201, by State of Wisconsin:

Before

HON. PHILIP J. FINNEGAN, *Circuit Judge*
HON. H. NATHAN SWAIM, *Circuit Judge*
HON. ELMER J. SCHNACKENBERG, *Circuit Judge*

Defendants-appellants having petitioned for a rehearing *en banc* and said petition having been referred to all Judges of this Court, who have now indicated their views as to whether said petition should be granted, and a majority of the Circuit Judges of this Circuit who are in active service, having voted that said petition be denied,

IT IS ORDERED, that the petition of defendants-appellants for a rehearing *en banc* be, and the same is hereby, DENIED.

Defendants-appellants having petitioned for a rehearing by the panel of Judges which heard and decided said cases, and said panel having voted to deny said petition,

IT IS ORDERED, that the petition of defendants-appellants for a rehearing, be and the same is hereby, DENIED.

OCT 25 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 470

WALTHER DAIRY PRODUCTS, THE BORDEN COMPANY, WISCONSIN SWISS AND LIMBURGER CHEESE PRODUCERS' ASSOCIATION, CHEESE PRODUCERS' MARKETING ASSOCIATION, WILD COOPERATIVE CHEESE COMPANY, AND STATE OF WISCONSIN,

Petitioners,

vs.

KRAFT FOODS COMPANY,

Respondent.

BRIEF OF RESPONDENT, KRAFT FOODS COMPANY, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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THE BUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 470.

WALTHER DAIRY PRODUCTS, THE BORDEN COMPANY, WISCONSIN SWISS AND LIMBURGER CHEESE PRODUCERS' ASSOCIATION, CHEESE PRODUCERS' MARKETING ASSOCIATION, WILD COOPERATIVE CHEESE COMPANY, AND STATE OF WISCONSIN,

Petitioners,

vs.

KRAFT FOODS COMPANY,

Respondent.

BRIEF OF RESPONDENT, KRAFT FOODS COMPANY, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

The subject matter of the litigation is U. S. Letters Patent No. 2,494,636, issued January 17, 1950, sometimes known as the "Stine patent," owned by Kraft Foods Company, covering improvements in the art of making Swiss cheese. (Also known as "Emmenthaler" cheese.) The Court of Appeals for the Seventh Circuit by a unanimous decision (234 F. 2nd 279) affirmed the judgment of the trial court holding all claims of the patent valid and certain claims infringed (IV, 2889).* Petitions for a re-

* The printed record on appeal is referred to in the same manner as in the petition. The opinion of the District Court is reported at 118 F. Supp. 1 (IV, 2809 ff.), and the Findings, Conclusions and Supplemental Findings at IV, 2846-2888.

hearing and for a rehearing *en banc* were both denied (Petition, p. 12a).*

The matters presented by petitioners are framed to read like questions of law. They actually involve attacks on Findings of Fact made by the trial court and unanimously affirmed on appeal, and as to which there is no basis for review.

QUESTIONS PRESENTED.

Petitioners' "Question 1," is based on the premise that the drying step in Stine's process was new, and not found in the old conventional Swiss cheese art. Therefore, they say, the claims fail to comply with the statutory requirements that claims should "particularly point out and distinctly claim" that which is new, *i.e.* "the invention." Since the courts below found that the drying step was a part of the old conventional process (pp. 15-16, *infra*), petitioners are quarreling with the findings of fact, rather than presenting a question of law.

A more accurate statement of the question would be:

> Question 1. Is any basis presented for a review of findings of fact that the introductory steps of an improved process were taken from the old conventional process?

Petitioners' "Question 2" purports to raise an issue of law, but again, actually involves a question of fact. Petitioners assert that in determining that one of the procedures used by Borden** infringed the patent (*i. e.*, Borden's staggered double wrap), the courts below failed to take into account that the claims of the patent had been limited or restricted by statements made and an affidavit

* The petition filed herein will be referred to as "Pet."

** The same abbreviated designations of the parties appearing in the petition will be used.

filed by Kraft in the Patent Office in the course of prosecution of the patent application. On the contrary, the trial court made *specific reference* to the admissions which Kraft had made in the Patent Office, and to the fact *that Kraft was bound* by these statements, *in the same Order* in which it held that the Borden procedure infringed the patent (p. 20, *infra*). Further, the finding of infringement was made after an actual inspection by the District Court of the infringing procedure as practiced at the Borden factory.

We suggest that a more accurate statement of the second question would be:

> Question 2. Is any basis presented for a review of the finding of infringement made by the trial court on the basis of an actual inspection of the infringing process at the infringer's plant?

STATEMENT OF FACTS.

The Statement of Facts appearing in the petition (pp. 4-14) do not accurately state the circumstances, hence respondent makes this counter-statement.

HISTORY OF CASE.

Respondent Kraft brought this action against Walther Dairy Products in early 1951, charging infringement of Kraft's Stine patent. It was learned upon discovery that Walther was operating as an agent for Borden, who had employed Walther to make the cheese in return for a "service fee", plus indemnification against liability for patent infringement, and that Borden was conducting Walther's defense (Findings 87-88; IV, 2869-70). On Kraft's motion Borden was joined as a defendant. It was also discovered during the pendency of the action that Borden was infringing in a small way in one or two of

its own plants (Findings 92-95; IV, 2872-2873; Supp. Finding B, IV, 2888).

Wild was given leave to intervene shortly after the suit was filed. Kraft discovered that Wild's intervention was actually on behalf of the Producers' Association and the Marketing Association, who had induced Wild's infringement, financed and controlled Wild's intervention, and agreed to hold Wild harmless (Finding 20; IV, 2850). Therefore the two Associations were joined as defendants.

The State of Wisconsin was also given leave to intervene. Although the State, together with the other petitioners here asserts that the Stine claims are defective, the State has pending against Kraft in the U. S. District Court of Delaware (*State of Wisconsin, et al.* v. *Kraft Foods Company,* C. A. No. 1533), an action filed in July 1953 in which it seeks to obtain a patent with claims *identical* to those here involved. Counsel for the State in that action include the attorneys who here represent the two Associations and Wild. The Delaware action is an appeal from the decision of the Patent Office in *Honer* v. *Stine,* 95 U. S. P. Q. 373 (1952), which was a Patent Office interference, pending at the time the State intervened in this action, in which the State asserted prior invention of the subject matter of the Stine claims by Honer, a State employee. The Interference Board held against Honer.

The case here under consideration was tried before District Judge Patrick T. Stone in the Western District of Wisconsin, in early 1953 in an extended trial lasting about six weeks, with a transcript of evidence of over 2,200 pages and with several hundred documentary exhibits. Not only was there extensive testimony and demonstration in the court room by experts in the cheese field and other witnesses on all phases of the case in-

cluding the conventional wheel Swiss procedures, the patented process, the prior art, and the issues of infringement, but in addition the trial judge, in the company of counsel and cheese experts for the parties, made a personal tour and *inspection of Swiss cheese plants of the parties* (I, 547-588). During this inspection he observed not only the use of the Stine invention at a Kraft plant, but he also witnessed the production of conventional wheel Swiss cheese at the plant of defendant Borden, and inspected and observed accused procedures employed by the various defendants.

The District Court rendered his decision finding that each of the claims of the patent is valid, and that claims 2 and 3 had been infringed by procedures practiced by the defendants. The court held that the State of Wisconsin was not liable for infringement because its activities had taken place as a governmental function (IV, 2880).

On appeal by all defendants, the judgment of the trial court was affirmed in its entirety, and petitions for rehearing were denied (Pet. pp. 1a-10a).

THE SUBJECT MATTER INVOLVED IN THE LITIGATION.

Swiss cheese has been produced in the United States for about 100 years. It is characterized by the large holes or "eyes" in the cheese and by its sweet nut-like flavor. Cheese produced by the conventional process is normally made in large "wheels" of from 160 to 230 pounds in weight and about 30 inches in diameter and 5 to 12 inches in height. By reason of the conventional method of manufacture (p. 9, *infra*) the finished wheel of cheese has a hard and inedible rind up to one-half inch thick and an additional area beneath the rind is without the proper eye formation and is less desirable than the interior portions of the cheese. Swiss cheese is usually marketed in

rectangular loaves or "sandwich cuts" and the conversion of the large circular wheel into "sandwich cuts" involves some additional loss, because the resulting odd shaped pieces bring a lower price. Although some Swiss cheese has been made in a more or less rectangular form in small blocks of 20 to 25 pounds, using the conventional rind-forming process, this product has generally proved inferior. As a result of these disadvantages, as late as 1947 a great majority of the retail outlets in the country did not handle any Swiss cheese (Findings 28-31; IV, 2852-4).

The Stine invention (described at page 10, *infra*) involved significant improvements. Among other advantages, for the first time it was possible to produce Swiss cheese without the usual wasteful rind, in a rectangular shape, in smaller and more marketable sizes, and with a flavor and eye formation throughout the body of the cheese which is on the average superior to that found in Swiss cheese made in the conventional manner (Finding 64; IV, 2862-3).

The statements by petitioners as to the relative position and importance of Swiss cheese in the dairy field in the United States (Pet. p. 5-6) are inaccurate. Swiss cheese is one of the various cheeses produced in the United States known as "foreign type" cheeses, examples of other foreign type cheeses being brick cheese, limburger cheese, blue cheese, etc. The cheese most commonly produced in the United States is American (or "Cheddar") cheese. For example, during 1951 the production of American cheese in the United States was approximately 873 million pounds (II, 966). As is well known in the dairy field, cottage cheese, not Swiss cheese, is second, the quantities produced each year approaching the production of American cheese. Swiss cheese production is much smaller. For example, in 1951 Swiss cheese production was about 92 million pounds (II, 966).

While Wisconsin is the leading Swiss cheese producing State, it is produced by others than Kraft in other States in various amounts. For example, it is produced in Ohio (III, 1882) where there is a very substantial Swiss cheese industry and in Utah (III, 1883), and in a number of other States outside the Seventh Circuit.

Although the record does not show the business set-up of the factories producing it, Swiss cheese is produced by cooperatives, corporations and individuals. During the years 1944-1946, Borden operated between 30 and 60 Swiss cheese plants in Wisconsin and Illinois (Finding 81; IV, 2868) and today operates or buys the entire output of a number of plants (II, 948-9). The production of Swiss cheese constitutes a cross section of various types and sizes of enterprise.

Not only is cheese handled by cooperative associations, such as the petitioner Marketing Association, but it is also distributed by other organizations such as Armour & Company, Swift & Co., Beatrice Foods Company and other corporations including petitioner Borden (II, 975-6). The Borden Company is a nation-wide organization, which sells Swiss cheese and many other products throughout the United States, and has been distributing millions of pounds of Swiss cheese annually for many years (II, 972-975).

Petitioners suggest that Kraft's patent "dominates the business" (Pet. p. 6). While the Stine process confers benefits not found in the conventional process it does not interfere with the freedom of the industry to continue to make Swiss cheese with a rind, either in the conventional wheel or in block form. Further, since it is a process patent, it does not bar the industry from making rindless block Swiss cheese, by any procedure which does not involve the use of the Stine invention.

Kraft's rindless Swiss cheese was first produced commercially in 1946. During that year, of a total national production of Swiss cheese of about 55 million pounds, 52 million represented production by others, about 2 million was Kraft's Wheel Swiss, and about 1 million pounds was Kraft's rindless Swiss. In 1951 the total national production was 92 million pounds of which about 60 million pounds represented production by others and 32 million pounds production of Kraft's rindless Swiss cheese (II, 966; Ex. 131, 132, I, 749-50, IV, 2492-3). In other words during this period the production of Swiss cheese by others than Kraft increased from about 52 million pounds to about 60 million pounds, or an increase of over ten (10) percent. During the same period the production of American cheese increased from 801 million to about 873 million pounds, or about nine (9) percent (II, 965-6). So we see that production of Swiss cheese *by others than Kraft* exceeded percentagewise the total increase in production of American cheese.

Kraft's production of rindless Swiss grew very sharply during these same years, for it reached markets which had never been available to the conventional wheel Swiss. As the trial court stated "The public acceptance of the product has been so marked that the sale of the rindless block Swiss cheese has been extended into new markets or outlets which formerly did not handle conventional wheel Swiss because of the inherent distributing and retailing difficulties involved in handling the wheel Swiss." (Finding 68; IV, 2865.)

Kraft did refuse to license Borden, a major competitor, when inquiry was made soon after the patent was issued (II, 955-6). Since shortly after that time the patent has been continuously in litigation no further consideration has been given to the question of licensing.

As to the statement (Pet. p. 5-6) that many dairy farmers in Wisconsin sell milk to Swiss cheese factories, this

is true. Kraft was interested in producing rindless Swiss cheese in Wisconsin but was prevented from doing so because until recently Wisconsin had restrictive regulations which prohibited the production of Swiss cheese not bearing the traditional rind (I, 424-8, 456-7). In consequence, Kraft has located its rindless Swiss factories elsewhere in the middle West, South and West, and has purchased large amounts of milk not only in these areas but also in Wisconsin for use in its Northern Illinois factories.

THE CONVENTIONAL SWISS CHEESE PROCESS AND THE STINE INVENTION.

Conventional rind-bearing Swiss cheese has for many years been made by a process consisting of nine steps described in column 1 of the Stine patent (IV, 2953). The first six steps involve the inoculation of the milk with the particular bacteria which produce the characteristic flavor and the eye formation, coagulating the milk, cutting and stirring the curd, separating the curd from the whey, and pressing the curd usually into the large "wheel" form (Steps 1 to 6). The curd is then floated in brine to introduce salt, which gives it the beginning of a rind (step 7). Step 8 is described in column 1—"Allow the body (of curd) to drain and store in a cool room, for example 50° to 60° F. for a short time, e. g., 4 to 15 days", which dehydrates the curd and causes more rind formation. At this point the cheese is ready for "curing"—in other words it is an "uncured body" of Swiss cheese. Step 9, that of curing, involves storing the uncured body "in a warm room for example 65 to 80° F. for 2 to 6 weeks, during which time *the body cures*"* i. e., the characteristic flavor develops, the "eyes" form in the body of the cheese, and as a result it swells up (about 17% in volume) and the surfaces become rounded. The curing step further increases the rind.

* Emphasis added in all quotations unless otherwise indicated.

James Bryan Stine was the first to invent a process by which rindless block Swiss cheese could be made. He took an *uncured body* of Swiss cheese made by the conventional method (i. e., a block of curd which had been made and pressed into rectangular shape, as described under steps 1-6 of the conventional process, and which had been brined as provided in step 7 and drained and stored as provided in step 8). Then before placing it in the warm room for curing as provided by step 9 of the conventional process, he first sealed the surface of the cheese with a coat of flexible or extensible fluid-proof sealing material, such as a wax or film. He then placed it in a confining form of a size sufficient to permit expansion of the cheese during curing and which could be expandable, e. g., with a "floating" lid and weight which could rise as the cheese expanded. He *then* placed the sealed and enclosed body of curd in the warm room to cure (Findings 52-54; IV, 2859-60).

At the end of the curing period it was found that the block of cheese had expanded to fit the box, and that the rind which had developed during the brining and drying step, had been *transmuted* into edible cheese, so that the cheese was rindless, and the entire body of cheese could be used. Further, it has been found that the Stine process creates a uniformity of salt and moisture conditions throughout the body of curd. This produces a better and more uniform eye formation, body, and flavor, throughout the cheese than is typically found in conventional Swiss (Findings 55, 56, 64; IV, 2860-1, 2862-4).

The industry had recognized for a long time that the production of conventional Swiss in wheel form involved disadvantages in manufacture and marketing. Attempts had been made before Stine to solve the problem, including the unsuccessful attempts carried on by the State of Wisconsin for a number of years, referred to in *Honer* v. *Stine*, 95 U. S. P. Q. 373, and in the trial court's findings

in this case (Findings 37-42; IV, 2855-7). They tried to apply the rindless American cheese teachings to Swiss cheese, e. g., wrapped the curd without the usual Swiss drying, did not seal but allowed the gas to escape, jammed the cheese into a form, etc., all as done in rindless American, and failed in all their attempts (Findings 97-110; IV, 2874-7).

Stine succeeded because he went contrary to the rindless American teachings (Memo. Op., IV, 2816). His invention won immediate recognition. For example when Arthur B. Erekson, a Borden cheese expert, addressed a cheese seminar in March 1950, about two months after the patent issued, and before this litigation began, he characterized the Stine invention as one of "the most startling change(s) • • • of this half century • • •", one of "the most discussed topics in Swiss cheese today" (I, 769 at 774).

THE STINE CLAIMS.

The process defined by each of the four claims of the patent (IV, 2955) starts with an "uncured body" of natural cheese "of the Swiss type", "prior to eye development in a warm room". The claims set forth that this "uncured body" is to be sealed, placed in a confining form and cured as provided in the respective claims.

The specification discloses the steps involved in producing the "uncured body". Column 1 of the patent states that "*For the purpose of this case* (i.e. this patent application) *a cheese of the Swiss type is considered to be* a cheese made by the Emmenthaler or Swiss process, which comprises the following steps:", and the nine steps of the conventional process are listed. The ninth step is the storage of the body of curd in the warm room "during which time the *body cures.*" In other words an "uncured body" of cheese of the Swiss type is one in which *all* of the *steps*

prior to the step of "*curing*" have taken place, including the making and forming of the curd, the brining of the curd (step 7) and the draining and storing of the curd (step 8) which causes the surface to dry. The specific example appearing at columns 3-6 of the patent also discloses the preparatory steps of making the block of curd and brining and drying it, in accordance with the conventional procedure.

Turning to Claim 2, which is typical, it claims "The improvement in the art of making a body of natural cheese of the Swiss type" which consists of sealing the surface of the uncured body, enclosing it in a confining form, and then curing the sealed and enclosed body. As the trial court said, "*Claim 2 of the patent is directed to the following three steps* in the process of making natural cheese of the Swiss type", and then lists "Step 1—*Sealing* the exterior surface of the uncured body prior to eye development in a warm room", "Step 2—*Enclosing* the sealed body in a mold", etc. and "Step 3—Placing the *enclosed sealed body* in a warm room" etc. It then goes on to say "Each of *these three steps is* adequately described in the patent specification and serves to *distinguish the process of the patent from the conventional Emmenthaler (Swiss) wheel process.*" (Finding 57, IV, 2861-2.)*

THE STEP OF DRYING IS ONE OF THE STEPS OF THE CONVENTIONAL PROCESS INCORPORATED BY REFERENCE IN THE CLAIMS.

Petitioners' entire argument as to the "drying step" is based upon an assumption of fact which is in *direct conflict with the Findings of Fact.* Petitioners start with the false premise that the step of drying the brined curd, one of the preliminary steps involved in the practice of the

* The differences between Claim 2, and 1, 3 and 4 are pointed out in Findings 58-60 (IV, 2862).

Stine process, was not a part of the conventional Swiss cheese process. They claim that the step was one of the novel steps in the Stine process and thus hope to convince this Court by their later argument (Pet. p. 16-18) that the claims failed, in part, to "point out and claim" the part of the process which was novel and constituted the invention, as was required by 35 U. S. C. Section 33 (as amended, 35 U. S. C. Section 112).

The lower courts' opinions and findings did not, as petitioners imply (Pet. p. 8), hold that the drying step distinguished the Stine invention from the conventional Swiss procedures. Rather, the references cited referred to the fact that the Stine process produces the unexpected result of transmuting the rind formed by the Swiss brining and drying steps, into edible cheese, and produces other benefits as to flavor, body, and eye formation.

As we shall show (pp. 15-16, *infra*) what the courts below actually found was that (1) the step of drying the brined curd was part of the conventional wheel Swiss process, (2) that it was an introductory step in the Stine process, but (3) that it was *not one of the novel steps which distinguish the Stine improvement from the conventional Swiss cheese procedure.* Thus, although petitioners have tried to obscure the fact, their entire argument as to the drying step does not involve an issue of law, but rather a quarrel with the Findings of Fact. Before reviewing these findings let us consider briefly petitioners' arguments as to the patent.

We have pointed out (pp. 11-12, *supra*) that the introductory language of the claims incorporates the eight steps required to make an "uncured body" of Swiss cheese curd. Petitioners argue (Pet. pp. 8-9), with complete lack of logic, that an "uncured body" of Swiss cheese curd is one which has been *drained* pursuant to step 8, but *not stored.* Then, reversing their field, they say that even if the brined curd

has been both drained and stored, it is not dry because of the "frequent washings with brine" in the storeroom (Pet. p. 9). In the conventional process the surface may be scrubbed with a brine solution every couple of days or so to add salt to the cheese (I, 98), although this is not a uniform practice (I, 550). However, this salting procedure does not keep the cheese "moist" as petitioners assert, but actually dehydrates the cheese and "develops a dry, hard surface" (I, 98). **The trial court found that the salt scrubbing operation which is carried on in the conventional process, not only while the curd is in the holding room but also in the curing room, "increases the dehydration** and hardening" (Finding 55; IV, 2860-1).

The argument (Pet. p. 9-11) that the specific example in the patent (Col. 3-6; IV, 2964-5) teaches that the drying step is to be practiced only when *wax* is used as the sealing material, is also incorrect. After describing a practice of the conventional steps, through brining, the example continues: "The blocks were then removed from the brine tank and put on carrying boards and allowed to stay in the holding room (held at about 50-55°F.) for about four days *until dry.* The outside surfaces of the block were then *sealed.* This may be effected *in different ways*" (Col. 5, lines 24-30; IV, 2955). The patent description then goes on to say that fluid mineral wax had been the preferred procedure but that "*Another method of sealing* the outside surfaces of the block *is to apply a wrap* of elastic-flexible material such as cellophane" which may be coated with wax, and goes on to specify the required properties of the sealing material "*whatever type of wax or other material* is used" (Col. 5, lines 41-47; IV, 2955). The teaching to hold "until dry" applies *regardless of whether the sealing material* is a "wax", a "wrap", or "other material".

In their attempt to show that drying was not disclosed or claimed in the patent, petitioners assert (Pet. pp. 10-11)

that Stine himself did not know that drying was a necessary step until some months after the Stine application was filed. The incident they refer to occurred at a Kraft plant in the fall of 1946 where surface difficulties began to appear. It was determined that the plant employees had failed to follow faithfully the step of drying and this was corrected (I, 287; Ex. 146, II, 1023, IV, 2532). Because Dr. Stine made investigation to make sure that there was not some other contributing cause for the difficulty (Ex. 146; II, 1023, IV, 2532-3) petitioners assert that he did not know that drying was a necessary step of his process.

Petitioners' own conduct refutes the assertion that the patent does not disclose and claim drying. In the Fall of 1949, before the Stine patent issued, the State Department of Agriculture, the two Associations, and Wild, were trying to make rindless Swiss cheese at the Wild plant, with a procedure of wrapping the curd "as soon as it is taken from the salt bath", *i.e.* without any drying step (Richardson report, Exhibit 137; II, 909, IV, 2502). In other words, *they were still trying to adapt the rindless American art,* and omitted the usual Swiss cheese step of drying after brining. In July 1950, after the experimenters had seen the Stine patent, their report commented "Apparently the blocks should be fairly dry when wrapped * * *" (Ex. 257; III, 1712, IV, 2682). As the trial court said, in pointing out that these petitioners did not know how to make rindless Swiss until they saw the patent, "*The Stine patent gave them this information.*" (Finding 75; IV, 2866.)

As shown by the following record references, the trial court found (1) that the drying step was part of the conventional Swiss process, (2) that the step of drying is practiced in the Stine process, (3) but that it *is not one of the steps which "distinguish* the process of the patent from the conventional Emmenthaler wheel process:"

In Finding 26 (IV, 2851-2) the nine steps of the conventional process which were referred to in the patent are listed, the eighth step being "Allow the body to drain and store in a cool room, for example 50-60°F., for a short time, e.g. 4 to 15 days."

In Finding 54 (IV, 2859-60) the trial court stated: "In the conventional step No. 8, the brined curd is usually drained and stored in a cold or holding room held at for example 50-60°, for a short time, such as from 4 to 15 days. In the Stine specific example the suggested temperature of the holding room is 50-55°F. and the blocks are held in the holding room for about four days until dry."

In Finding 55 (IV, 2860): "In the conventional wheel Swiss process the finished wheel has a hard, inedible rind of about ½ inch in thickness heretofore referred to, resulting from the brining, *holding room period*, and curing, during which the uncured cheese is turned and scrubbed with salt two or three times a week, increasing the dehydration and hardening."

In the Memorandum Opinion (IV, 2834) the trial court states that in Stine's process the brined curd is "drained and stored in a cold or holding room, held at a temperature of 50 to 60 degrees for a period of from 4 to 15 days until dry." This is, of course, step 8 of the conventional process.

As we pointed out (p. 12, *supra*), the trial court specifically held that the patent claims are "directed to", the three steps of sealing, confining, and of curing the sealed and confined body of curd and that "Each of *these three steps* • • • serves to *distinguish* the process of the patent from the conventional Emmenthaler (Swiss) wheel process." The court did *not* include the drying step as one of the distinguishing steps.

Finally, a comment on petitioners' statements as to the rindless American cheese methods (Pet. pp. 7, 8). In the trial court, petitioners cited these methods as an alleged anticipation, and Kraft pointed out a number of significant differences between the Stine process and the rindless American procedures, including the fact that the rindless

American teachings involved no drying step (Finding 97; IV, 2874). Petitioners imply that therefore the claims must specifically recite the drying step to distinguish them from the *American* cheese art. But the Stine invention is not an improvement in American cheese making. It relates solely to an improvement in the art of making *Swiss* cheese, and all the claims need to do is to point out and claim that which is novel *in the Swiss cheese art* and which constitutes the improvement in that art.

THE TRIAL COURT IN FINDING INFRINGEMENT, HAD THE LIMITATIONS IMPOSED ON THE STINE CLAIMS IN THE PATENT OFFICE SPECIFICALLY IN MIND.

As petitioners say (Pet. p. 12), a Jones patent and other art dealing with rindless American cheese was cited as a reference against the Stine application in the Patent Office. Without going into detail, the Jones patent (IV, 3003) taught that rindless American cheese could be produced by a process which included wrapping the cheese in a film which should be folded over so as to "provide an outlet for exit of air and gasses." (Col. 2, lines 39-41 IV, 3003). Kraft filed a response (IV, 2409-2420) which pointed out a number of differences between the teachings of the Jones patent (and the other rindless American art) and the Stine process, including the fact that the Stine application teaches that the surface of the Swiss cheese curd should be covered with an unbroken film, whereas Jones teaches "loosely wrapping of cheddar and the need for providing gas escape openings in the wrapper" (IV, 2415).

Petitioners assert that in holding that one of the procedures demonstrated by Borden infringed the Stine patent, the courts below have "ignored" the limiting effect of these Patent Office proceedings (Pet. p. 11).

First, it should be observed that although reference is made to "petitioners' methods" (Pet. p. 13) the procedure in question was devised and used solely by Borden. Second, petitioners are inaccurate when they assert that "petitioners' methods * * * wrapped the cheese *in the same way* (as Jones) with two sheets of Pliofilm, one over the other." (Pet. p. 13.) The Borden procedure does not merely involve wrapping the cheese in two sheets instead of one, as petitioners imply, but involves what may aptly be referred to as Borden's "staggered double wrap" method of sealing.

The procedure involved placing the uncured block of Swiss curd on two long sheets of Pliofilm wrap which had been placed on a table at *right angles* to each other. One sheet was wrapped around the block with overlaps of from 4 to 6 inches at the top, the ends were folded and the film was held in place by several pieces of Scotch tape. Then the second sheet of Pliofilm was wrapped around the block and Scotch taped, but because of the fact that the second sheet was at right angles to the first sheet, the end folds on one layer of film were at the sides of the cheese, and the end folds of the other layer were at the ends of the cheese, and the 4 to 6 inch overlapping seams at the top ran at right angles to each other. A third layer of glassine was applied over the other two layers and also fastened with Scotch tape.* The sealed box was then placed in a confining form and the sealed and confined block was cured.

Borden's obvious purpose in devising this staggered double wrap procedure was to effect a seal so as to obtain

* Borden sometimes applied a coating of mineral oil to the inner surface of the two layers of Pliofilm, which caused the seams to stick together and aid the sealing action of the staggered double wrap (Findings 92-95, IV, 2872-3), but the mineral oil was not applied in the instances petitioners seek to bring before this Court.

the benefits of the Stine invention, and at the same time to try to convince the court that it was not infringing.

District Judge Stone had this sealing procedure demonstrated to him by Borden at his inspection of the plants of the parties (I, 555-561) and also viewed Swiss cheese, in Borden's curing room, which had previously been sealed with this procedure (I, 568-9). There was also displayed to him at the trial samples of rindless American wrapped in accordance with the teachings of the rindless American art (II, 1358-1370), including an example of the overwrapping referred to by petitioners and which they incorrectly imply to have been like Borden's staggered double wrapping procedure (Pet. p. 14). Since Borden had used the staggered double wrap procedure only experimentally, on only a few blocks of Swiss, the trial court did not deem it necessary to make a finding on it in his original findings of fact. However, petitioner Borden thereafter asked the trial court to make a finding of non-infringement (IV, 2883-4). Judge Stone then made a finding that Borden had experimented with the production of rindless block Swiss cheese by this procedure and that "such a process is covered by and *infringes* each of Claims 2 and 3 of the Stine patent." (Supplemental Finding B; IV, 2888.)

Petitioners now say that in making this finding, the trial court *ignored* the limitations which were imposed by the Patent Office proceedings, *i. e.* the restrictions on the claims imposed by reason of the distinctions which Kraft made between the Stine invention and the teachings of the Jones patent.

It is hard to conceive of a contention more directly contradicted by the record. The record shows that *the same Order which found infringement, specifically recited*

and reaffirmed the limitations which petitioners say were overlooked. We have reproduced the pertinent portions of the Order (IV, 2887-8) in a footnote.*

The trial court's finding of infringement was a finding of fact, as petitioners admit, a finding of "equivalents" (Pet. p. 14). It was made with full awareness of the Patent Office limitations, and after an inspection of the infringing Borden process. There is no basis for a review of this finding of fact.

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* "ORDER MAKING SUPPLEMENTAL FINDINGS OF FACT.

(Filed Feb. 26, 1954, Edgar M. Alstad, Clerk.)

"This cause having come on to be heard on motion pursuant to the provisions of the Federal Rules of Civil Procedure, Rule 52(b), and this Court having heard arguments of counsel and being advised in the premises,

"Hereby makes, in addition to the Court's findings dated February 1, 1954, the following supplemental findings:

"Supplemental Finding A.

"***Kraft's position in the Patent Office*** during the prosecution of the Stine patent • • • ***was that the wrapping procedure shown specifically by the Jones patent***" (and other rindless American cheese wrapping methods) "• • • *was not a 'seal'* within the meaning of the Stine claims. ***Kraft admits*** that said wrapping procedures do not constitute sealing under the terms of any of the claims of the Stine patent. • • •

"Supplemental Finding B.

"Prior to October 22, 1952, Borden experimented with the production of rindless block Swiss cheese by a process which was identical with the process described in Findings 92, 93, and 94," (the staggered double-wrap process) "except that no mineral oil was applied to any of the surfaces of the Pliofilm wrappers. Such a *process* is covered by and *infringes* each of Claims 2 and 3 of the Stine patent.

"Dated: February 26, 1954.

"PATRICK T. STONE,
United States District Judge."

ARGUMENT

NO SPECIAL OR IMPORTANT REASONS FOR CERTIORARI ARE PRESENTED.

At pages 15-16 petitioners advance three arguments for the grant of a writ. They assert (1) that the claims of the Stine patent as construed by the courts below have a "broad construction", a "broad and indefinite scope" and are so "nebulously broad" as to interfere with the use by the industry of any "improved and non-infringing methods" which the State hopes to devise; (2) that Kraft, with the Stine patent, "dominates the industry"; and (3) that because Wisconsin is the largest Swiss cheese producing State, it is improbable that the Stine patent will be litigated in other Circuits. We will answer these arguments in reverse order.

As concerns the point that the Swiss cheese industry is concentrated in the Seventh Circuit, we have pointed out (p. 7 *supra*) that Swiss cheese is manufactured by others than Kraft in a number of States other than Wisconsin, including Ohio (Sixth Circuit) and Utah (Tenth Circuit) among others. Relative to the statement that "The State and the other petitioners are the parties most able to oppose the respondent" (Pet. p. 16) the fact is, as the record shows, that the conduct and control of the defense in this litigation has been primarily by Borden and the two Associations, who induced the Walther and Wild infringements. The fact that Borden and the two Associations are large organizations, and that the judgment below bars them from further direct or indirect attacks on the Stine patent, is no ground for certiorari.

As concerns the assertion that Kraft's patent dominates the industry, as we have pointed out (p. 8, *supra*), although Kraft's rindless Swiss cheese has won a wide ac-

ceptance, at the same time the production of conventional wheel Swiss cheese grew over 10 percent between 1946 and 1951, and expanded faster percentagewise than the production of American cheese. The Stine patent does not prevent the industry from continuing to produce the conventional wheel Swiss cheese, and since the patent contains process claims only, it does not prevent others from producing rindless block Swiss cheese, so long as it does not involve a use of the Stine method.

As to the argument that the patent claims are "broad", "indefinite" and "nebulous" so as to interfere with the enjoyment of benefits from research on "improved and non-infringing methods", the only grounds advanced for these charges are the fallacious arguments as to drying and as to Borden's staggered double wrap method. Petitioners' attacks on the Stine patent are not based on interest in research on non-infringing procedures, but on the hope they can obtain the patent for themselves, or destroy it. It is for this reason that the State, represented by the same counsel who represent the Associations and Wild in this case, are trying to obtain a patent with claims identical to Stine, in *State of Wisconsin* v. *Kraft Foods Co.*, pending in the District Court of Delaware (p. 4, *supra*). And it is for this reason that they are striving so desperately to establish some technical defect in the Stine patent, which covers an admittedly worthwhile invention.

THE PATENT CLAIMS ARE NOT INADEQUATE, AND PETITIONERS' ARGUMENT IS AN ATTACK ON THE FINDINGS OF FACT.

Petitioners' argument that the courts below erred in sustaining the patent claims *is based on the erroneous contention that the drying step was new* in Swiss cheese making, and that therefore the Stine claims had failed to comply with 35 U. S. C. 33 (as amended, now 35 U. S. C.

Sec. 112), in effect when the Stine application was filed, which provided that the inventor "shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery." This Court in *General Electric Co.* v. *Wabash Co.*, 304 U. S. 364, 368-369 (1938), said of this section:

> "*Recognizing that most inventions represent improvements* on some existing article, process or machine, and that *a description of the invention must* in large part *set out what is old* in order to facilitate the understanding of what is new, Congress requires of the applicant '*a distinct and specific statement of what he claims to be new,* and *to be his invention.*' "

In other words, claims in an improvement patent must necessarily contain (a) a reference to what is old, in order to understand what the improvement is, and (b) a distinct statement of what is claimed to be new.

It is too well settled to require discussion that claims are to be read in the light of the specification, for as this Court said in *Graver Mfg. Co.* v. *Linde Co.*, 336 U. S. 271, 277 (1949), "vain repetition is no more to be encouraged in patents than in other documents, and claims like other statements may incorporate other matter by reference", so long as they particularly point out and claim the invention. In the Stine claims (a) the reference in the claim to the "uncured body" incorporates the steps of the conventional Swiss process involved in producing a body of curd ready for the curing step, *i. e.*, the forming, brining and drying of the block of curd, and (b) the novel steps, *i. e.*, sealing the curd, confining the curd, and curing the curd while so sealed and confined, are particularly pointed out and distinctly claimed.

Petitioners' argument of law as to the statutory requirements for patent claims, has no application, because it is based on an assumption of fact in direct conflict with the findings of fact below.

PETITIONERS' ARGUMENT ON INFRINGEMENT INVOLVES ONLY A FURTHER ATTACK ON THE FINDINGS OF FACT.

In another extreme attempt to find some "question of law" to raise to this Court, petitioners assert that in finding infringement by Borden's staggered double wrap procedure, the trial court ignored the limits imposed on the claims by statements made and affidavit filed by Kraft in the Patent Office. Therefore, they say, the trial court, and the Seventh Circuit in affirming the judgment, are "in conflict with" the decisions of the Third, Fifth, Sixth and Tenth Circuits which hold that such statements and affidavits limit the claims for the purpose of determining infringement (Pet. p. 20).

This whole argument is exploded by the record which shows that in the *same Order* of February 24, 1954, which found infringement, the trial court *specifically referred* to the limitations imposed by Kraft's statements and affidavit, and pointed out that Kraft admitted that it was bound by the limitations applied in this litigation (p. 20, *supra*). An argument which assumes that the trial court commented on those limitations in one paragraph and forgot about them in the *next paragraph of the same Order* need not be dignified by any comment.

Since the courts below applied the more restrictive rule of the Third, etc Circuits, which petitioners contend to be the correct rule, no point of law is presented. The finding of infringement, which was based on expert testimony, demonstrations and inspections of the patented process, the alleged prior art, and the infringing process, was a finding of fact, *Graver Mfg. Co.* v. *Linde Co.*, 339 U. S. 605, at 609-10 (1950).

CONCLUSION.

It has been unnecessary to consider whether petitioners' contentions as to the law are correct, for the reason that those contentions are based upon assumptions of fact in direct conflict with the Findings of Fact of the courts below. In substance petitioners are asking this Court to accept jurisdiction for the purpose of reviewing and reversing Findings of Fact.

This case clearly comes within the language in *Graver Mfg. Co.* v. *Linde Co.*, 336 U. S. 271 at 274-5, where this Court said as to the statement in Rule 52(a) (F. R. C. P.) that due regard be given to the opportunity of the trial court to judge credibility:

> "• • • To no type of case is this last clause more appropriately applicable than to the one before us, where the evidence is largely the *testimony of experts* as to which a trial court may be enlightened by scientific demonstrations. This trial occupied some three weeks, during which, as the record shows, the trial judge *visited laboratories with counsel and experts* to observe *actual demonstrations* of welding as *taught by the patent* and of the welding *accused of infringing it*, and of *various stages of the prior art*. He viewed motion pictures of various welding operations and tests and heard many experts and other witnesses. He wrote a careful and succinct opinion and made findings covering all the factual issues."

Petitioners complain (Pet. pp. 14, 17) that the Court of Appeals did not specifically discuss the particular points which petitioners now seek to propose here. The questions of fact and law raised by petitioners in the court below were many and varied, and aptly characterized as "clusters of issues and propositions of law" (Pet. p. 4a). The Court of Appeals pointed out in its opinion (Pet. pp. 1a-10a) that the findings of fact and conclusions of law had been "subjected to detailed study" (Pet. p. 3a), dis-

cussed some of the points raised by petitioners and then said "After mature deliberations we found so little substance in the variety of points sponsored by defendants that any detailed or further discussion here is needless. Our canvass of this record, measured by all the contentions defendants urge, has well satisfied us of the absence of any reversible or prejudicial errors" (Pet. p. 10a).

As this Court said in *Graver Mfg. Co.* v. *Linde Co.*, 336 U. S. 271, at 275:

> "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of very obvious and exceptional showing of error."

The petition for writ of certiorari should be denied.

Respectfully submitted,

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NOV 5 1956
JOHN T. FEY, Clerk

In The

Supreme Court of the United States

October Term, 1956

No. 470

WALTHER DAIRY PRODUCTS,
THE BORDEN COMPANY,
WISCONSIN SWISS AND LIMBURGER CHEESE
PRODUCERS' ASSOCIATION,
CHEESE PRODUCERS' MARKETING ASSOCIATION,
WILD COOPERATIVE CHEESE COMPANY, AND
STATE OF WISCONSIN,
Petitioners,

vs.

KRAFT FOODS COMPANY,
Respondent.

SUPPLEMENTARY SEPARATE ANSWER OF THE STATE OF WISCONSIN TO THE BRIEF OF KRAFT

VERNON W. THOMSON,
Attorney General,

ROY G. TULANE,
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THE GILMAN PRESS, MADISON, WISCONSIN

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SUPPLEMENTARY SEPARATE ANSWER OF THE STATE OF WISCONSIN TO THE BRIEF OF KRAFT

I.

"Quousque tandem abutare 'Kraftus' patientia nostra . . . quem ad finem sese effrenata quotie jactabit audacia."

With the utmost respect to this Honorable Court, we respectfully suggest that the brief of Kraft indefensibly

misrepresents the position of the State of Wisconsin in this proceeding.

Kraft knows full well:

1. The State of Wisconsin in 1943, through its employe, Clemence J. Honer, attempted to make rindless Swiss cheese by the wrapping and boxing process which is clearly within the claims of the Stine patent had it not been for Supplemental Finding A.

2. The State of Wisconsin, at all times since 1943, in its experiments, continued to use the wrapping and boxing process (II 1561; III 1680, 1770; II 1569, Ex. 235, 1576-7; III 1822-4; III 1691-1825-1831).

We here point out that the Kraft brief on certiorari clearly sets forth their assertion that the alleged failure of the State, found by the trial court and confirmed by the Court of Appeals, resulted from the *treatment of the curd* (that is, alleged failure to dry) that was placed in the wrapping and had nothing to do with the wrapping or the boxing which is the only matter covered by the claims of the patent.

3. The State of Wisconsin in January, 1951, after it found out that Kraft had obtained a patent upon a process which the State believed was not patentable, instigated an interference proceeding before the Patent Office by filing a patent claim which read on the Kraft claims for the purpose of establishing its priority *IF* there was a patentable invention.

4. The State of Wisconsin in 1952, after it had learned of the Kraft action to enforce its patent in the United States District Court for the Western District of Wisconsin, moved

to be interpleaded in the action in order to be able to lend its counsel and financial assistance to insure that a final determination of the validity of the Kraft patent would be obtained.

5. The State of Wisconsin, through its attorney general, and members of its department of agriculture, have at all stages since its intervention, actively participated in the prosecution of this case through the District Court, the Court of Appeals, and in the application for a writ of certiorari.

Any attempt to minimize the interest of the State of Wisconsin as the real party in interest in this action in its capacity as *parens patriae* for the people of Wisconsin and in particular its producers of Swiss cheese, who produced 65% of all the Swiss cheese in the United States before the entrance of Kraft into this field, is utterly unfair and misleading.

6. The State of Wisconsin, despite the fact that it was compelled by tactical reasons to take an appeal to the U. S. District Court of Delaware to keep its claim of possible title alive has, both in the District Court and the Court of Appeals strenuously urged as its primary argument that such broad and functional claims as the Kraft claims should not be allowed.

By our failure to request certiorari of the finding of failure upon the part of the State, we have sought to simplify the issue before this court and have effectually abandoned any claim of title or that claims in the form of the Kraft claim, are valid.

7. The State of Wisconsin is the only state which has an interest in the Swiss cheese industry which would justify it in undertaking the severe financial expense of this litigation. Ohio's production is so comparatively small that as of the date of this writing the attorney general of Ohio has not yet requested permission to appear in this action.

8. The State of Wisconsin has at all times insisted that functional patents destroy all incentive to research, whether in our University or in our state laboratories.

Kraft's assertion at the bottom of Kraft brief, p. 7, that rindless Block Swiss may be made by any procedure which does not involve the Stine invention is a cynical and meaningless concession, when Inventor Stine repeatedly asserted on the witness stand that the limits of his patent were defined by the *result;* that is, he asserted outright that if a method of wrapping and boxing *resulted* in good Swiss cheese, it was covered by his patent. (I 329-330, III 2128, cf. II 1016-17).

If any process which gives the proper result is covered by Stine's claim, why should the State of Wisconsin ever spend another dollar for research?

II.

Just as the cold prose and the analytical logic of the decision in the *Dartmouth College* case in no way reflect the emotion that rang from Daniel Webster as he pleaded the cause of his little college, so the dried bones of the transcript and the decisions thus far in this case give no indication of the human impact and the havoc that may result from an improper decision.

We believe that historical facts are within the judicial knowledge of this court upon any proper presentation thereof, and propose to outline summarily the history of the Swiss peoples in Wisconsin. One of the many moving stories in the annals of the people of Switzerland is the story of the Canton of Glarus and the poverty which more than one hundred years ago led it to form an Emigration Society and send two agents to America to search out new pastures where they could move their surplus peoples and establish their homes and their herds and make their living.

In the rolling, green clad hills and watered valleys of Green County on the southern border of Wisconsin, the prospectors found the site for their New Glarus and thereafter the Emigration Society year by year acted to aid its people in their trek to their new home.

The abstracts of title to the land in Green County show the names of many of these pioneers, Nicholaus Duerst and Fredolin Streiff among the first, and Frederic Egger and F. Streiff, who were the agents of the Emigration Society of Canton Glarus.

Over the years, the Swiss and their descendants established their Brown Swiss cattle on the hill pastures of Green County and immediately turned to the production of that product which was best known to them, that is, the cheese originally made in the valley of Emme in Switzerland, known in Switzerland as Emmenthaler cheese, and in America as just plain Swiss cheese. Swiss people established a sturdy, thrifty, prosperous farming community based on their famous cheese whose production grew over the years until in the 1940s, they were producing some 65% of all the Swiss cheese produced in the United States

and their county seat of Monroe proudly proclaimed itself as the Swiss Cheese capital of the United States.

Throughout the years, Green County and its Swiss residents continued to produce scholars, doctors, lawyers, statesmen, and at the same time to maintain the colorful customs of their homeland. On festival days, they would wear their native Swiss costume, entertain with their famous Swiss flag throwers, displaying the flags of all the Cantons, and with the Swiss bell ringers; and evoke the call of their mountain home with a 15-foot long Alpine horn.

And annually, at the close of summer, they reaffirmed their traditions of resistance to tyranny in any form with a dual presentation of the play honoring their legendary hero, William Tell.

It is the traditional way of life of these people who established the Swiss cheese industry in the United States that is threatened if they are not allowed to compete on an equal footing with others in that industry.

III.

Along with the other petitioners herein, we repectfully submit that the facts in this case are not in dispute insofar as this appeal is involved. We further submit that the rule is clearly established in this Court, particularly in the case of *U. S. v. Appalachian Electric Power Co.*, 311 U. S. 377, that when the facts are not disputed, their proper interpretation becomes a question of law. Hence, it would appear that Kraft's claim that a lower court may find infringe-

ment as a fact, when as a matter of law the undisputed facts do not justify such a conclusion is utterly erroneous.

CONCLUSION

We respectfully submit to the court that a proper decision in this case is of great importance to the peoples of the State of Wisconsin. We further join with our other petitioners in submitting that a vital question of law is involved, that is whether matters not covered by the claims can be read into the claims, Certiorari should be granted.

Respectfully submitted,

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